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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

PETRA MARTINEZ,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. C 09-05630-WHA
	)	
AMERICA'S WHOLESALE LENDER,	)	
COUNTRYWIDE HOME LOANS SERVICING	)	
LP, BANK OF AMERICA, RECONTRUST	)	
COMPANY, AND BANK OF NEW YORK	)	
MELLON,	)	
	)	San Francisco, California
Defendants.	)	Thursday
	)	March 4, 2010
	)	2:15 p.m.

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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1           **THE COURT:** Let's go to Petra Martinez.

2           **THE CLERK:** Case number 09-5630, Petra Martinez  
3 versus America's Wholesale Lender.

4           Counsel, please state your appearances.

5           **MR. ROONEY:** Mike Rooney, appearing for  
6 Petra Martinez.

7           **MR. LUI-KWAN:** Kalama Lui-Kwan, for defendants. Good  
8 afternoon, your Honor.

9           **THE COURT:** Good afternoon.

10          All right. This is a motion by defendants. Go  
11 ahead.

12          **MR. LUI-KWAN:** Thank you, your Honor. I'll be brief.  
13 I know your schedule is tight. I'd like to make just two  
14 big-picture points, and I won't belabor any of the details that  
15 we've submitted in the briefs.

16          First is that we showed in the briefs that we  
17 complied with Section 2924 and the nonjudicial foreclosure  
18 statutes. We showed that we don't have any -- there's no  
19 requirement that we possess the promissory note; but in any  
20 event, we do.

21          **THE COURT:** Say that again.

22          **MR. LUI-KWAN:** There's no requirement under  
23 California law that we possess the promissory note; but in any  
24 event, we do.

25          **THE COURT:** All right.

1           **MR. LUI-KWAN:** And that, even though we made --

2           **THE COURT:** Who is the "we" part? Which one of these  
3 entities does possess it?

4           **MR. LUI-KWAN:** Bank of New York.

5           **THE COURT:** Bank of New York.

6           **MR. LUI-KWAN:** Bank of New York Mellon.

7           **THE COURT:** And is that in the -- is that document in  
8 the record somewhere?

9           **MR. LUI-KWAN:** Yes, your Honor, it is.

10          **THE COURT:** Okay.

11          **MR. LUI-KWAN:** And specifically, if you look at our  
12 brief -- at our opening brief at page 19, that will point you  
13 to all of the documents.

14          **THE COURT:** Okay. All right. Thank you.

15          **MR. LUI-KWAN:** Now, even though we've submitted all  
16 of this evidence, plaintiff hasn't offered any evidence to show  
17 that we're wrong. For instance, he hasn't -- or she hasn't  
18 offered any of evidence showing that any other entity has come  
19 forward to demand payment on the mortgage. And so, quite  
20 frankly, there's no dispute as to whether or not we comply with  
21 the law, or whether we have an interest in proceeding with  
22 foreclosure. That's point one.

23               Point two is that plaintiff is basically turning  
24 nonjudicial foreclosure law in California upside down. The  
25 whole point of the nonjudicial foreclosure statutes is to make

1 sure that there's an efficient, orderly way of proceeding with  
2 foreclosure, so that parties can avoid the cost of litigation;  
3 but by filing a complaint and multiple briefs that make wild  
4 and truly false accusations about defendants, Ms. Martinez is  
5 essentially forcing us to engage what is basically a judicial  
6 foreclosure process. And by doing that, she is not only  
7 consuming the Court's time/resources, but obviously, our own.

8 And, just like so many of these other  
9 foreclosure-delayed cases, three things almost always happen at  
10 the end. Number one, plaintiff will spend more time on the  
11 property without paying rent or without paying mortgage.  
12 Number two, the suit gets dismissed for failure to state a  
13 claim. And, number three, defendants end up paying for truly  
14 unnecessary legal fees responding to baseless accusations.

15 I'll pause here. I realize you have a time issue.

16 **THE COURT:** All right. Let's hear from the  
17 plaintiff.

18 **MR. ROONEY:** I'll just respond to those, your Honor.  
19 Excuse me.

20 They represent they've complied with 2924.

21 That's not the case. The first sentence of 2924  
22 requires there be a note and a mortgage interest in favor of  
23 the party seeking to foreclose under that statute.

24 There is no evidence on the record that they possess  
25 it. The only evidence is testimony from Michael Cerchio, who

1 has no evident personal knowledge of any of the facts he  
2 testifies to.

3           The Bank of New York Mellon does not provide a copy  
4 either of the original note, or of a note that's been  
5 transferred to the Bank of New York Mellon. The only note on  
6 the record remains a note made in favor of America's Wholesale  
7 Lender. So, for a party claiming that its foreclosure interest  
8 arises from transfer of the note, it's appropriate for the  
9 Court to require evidence of such a transfer, because they  
10 can't foreclose on someone else's right.

11           The declaration of Petra Martinez not only shows that  
12 the defendants failed to contact her prior to filing a notice  
13 of default pursuant to 2923.5, but it also points out the --  
14 many of the origination documents offered into evidence by the  
15 defendants are clearly redated by another person who wasn't the  
16 plaintiff or her husband, who also signed the documents  
17 sometime after origination.

18           In no uncertain terms, her declaration states that  
19 she signed and dated on the 4th, and that it's not her  
20 handwriting. That shows the date being January 13th. And if  
21 you'll look through -- I believe it's the declaration of  
22 George Merziotis, at Exhibit A, the loan application has been  
23 redated by another person. Exhibit B, the truth in lending  
24 disclosure statement, you can clearly tell that that's neither  
25 her nor her husband's handwriting and date. The notice of

1 right to cancel, again, has been redated. And it looks like  
2 initials have been cut and pasted from another document. And  
3 the whole thing is a fabrication.

4 So that's what evidence we brought, because  
5 essentially, that's -- that's what they mentioned in their  
6 motion. So we didn't go outside that scope.

7 **THE COURT:** Let me ask you a question about something  
8 you said.

9 Plaintiff's declaration says -- I'm going to quote  
10 from paragraph 16 of her declaration under oath.

11 "Prior to December 27th, 2009."

12 Do you have that handy?

13 **MR. ROONEY:** I am looking. Yes.

14 **THE COURT:** (Reading)

15 "Prior to December 7th, 2009,  
16 defendants did not attempt to reach me by  
17 phone pursuant to Civil Code Section  
18 2923.5. Defendants did not send me the  
19 letters described therein" --  
20 -- referring, I guess, to 2923.5.

21 -- "or certified letters described  
22 therein to try to work my loan default out  
23 with me."

24 Is that right?

25 **MR. ROONEY:** Yes.

1           **THE COURT:** Now, in the submission by defendants,  
2 there is an Exhibit Number N, as in "Nancy." It's a fax. And  
3 looks like it was a fax that was sent on behalf of your client,  
4 Ms. Martinez, by someone called "Placer Financial Services."  
5 Looks like someone named Ron D-o-s-t-e-r. Doster. Are you  
6 with me so far?

7           **MR. ROONEY:** Yes, your Honor.

8           **THE COURT:** All right. So that fax says, dated  
9 2/24/09,

10                    "To Whom it may Concern, Please review  
11                    attached for a short sale or loan  
12                    modification for Petra Martinez."

13           And then this says, "From Ron Doster," and phone numbers,  
14 and so forth. And attached to that is a letter from Ron  
15 Doster, again asking for consideration of a short sale.

16           Then, going back to page -- doesn't have a page, but  
17 there's a letter on Countrywide Home Loans' stationery, dated  
18 September 16th, 2008, addressed to Petra Martinez. And it  
19 starts off saying,

20                    "This letter is being sent pursuant to  
21                    California Code Section 2923.5."

22           Now, the way I read this is that her own broker had  
23 this letter from Countrywide under 2923.5. And I don't see how  
24 you can reconcile that, if that's true, with what your client  
25 says; that no one ever sent her such a letter under 2923.5. So

1 what am I missing here?

2           **MR. ROONEY:** Your Honor, in the opposition at page  
3 21, line 4, through page 22, line 7, it sets forth the  
4 requirements of 2923.5. I understand that they sent her this  
5 single letter. I showed Ms. Martinez 2923.5, which contains  
6 numerous requirements beyond a single letter stating to be  
7 under 2923.5.

8           For one thing, such letter can only be sent after due  
9 diligence has been made on behalf of the beneficiary to contact  
10 the borrower personally.

11           Secondly, borrower has a right to schedule a meeting  
12 within 14 days, and to be represented by an attorney at that  
13 meeting.

14           At G -- Subsection G. of 2923.5, it says, Despite  
15 such due diligence, if they can't reach the borrower, then  
16 they'll first attempt to contact by sending a first-class  
17 letter. After the letter has been sent, they'll attempt to  
18 contact the borrower by phone three times at different hours on  
19 different days. They can use an automated dialing system. If  
20 the phone number's disconnected, it's excused; but if they  
21 don't respond within two weeks after the telephone call, then  
22 they shall send a certified letter with return receipt  
23 requested, and provide such means to contact them during  
24 business hours.

25           Mortgagee, beneficiary, or authorized agent has a



1 puts a prominent link on the home page of its Internet website.  
2 Options that may be available to borrowers are listed on the  
3 website. List of financial documents, a toll-free number, and  
4 a number to HUD. Those are the requirements of 2923.5.

5 In the opposition at page 22, line 8, on, is the  
6 argument why a single letter doesn't satisfy 2923.5, nor do the  
7 contents of that letter satisfy the spirit of 2923.5.

8 **THE COURT:** So when your client said under oath,  
9 "Defendants did not send me the letters," plural, "described  
10 therein or the certified letters described therein to work out  
11 my loan default with me," was she aware of this letter right  
12 here that was attached (indicating) to the other side's  
13 submission, which letter was dated September 16th, 2008?

14 **MR. ROONEY:** I'm sure she was aware of the letter,  
15 your Honor. I don't think the wording of her declaration is  
16 such that she's denying receipt of that single letter.

17 She's saying that, with knowledge of the entire  
18 scheme of 2923.5, defendants did not comply.

19 **THE COURT:** Is she a lawyer?

20 **MR. ROONEY:** Well, I read her 2923.5. And I had her  
21 look at it. And I asked her, "Did they do all of this stuff  
22 before the default?" And she said, "No."

23 **THE COURT:** Is she a lawyer?

24 **MR. ROONEY:** No.

25 **THE COURT:** All right. I'll have to leave it there.

1 Under submission. Thank you.

2 **MR. LUI-KWAN:** Thank you, your Honor.

3 Oh, one last item, your Honor. Mr. Rooney and I have  
4 been discussing our upcoming case management conference in this  
5 case, which I believe is currently set for a week from today.  
6 In light of the Court's pending ruling on the motion for  
7 summary judgment, would the Court be willing to continue the  
8 C.M.C. by 30 days?

9 **THE COURT:** When is it coming up?

10 **MR. LUI-KWAN:** Next week, Wednesday.

11 **THE COURT:** We'll put it off one week. Postpone that  
12 by one week. All right. Thank you.

13 **MR. LUI-KWAN:** Thank you, your Honor.

14 **MR. ROONEY:** Thank you, your Honor.

15 **THE COURT:** Mm-hm. All right.

16 (At 2:30 p.m. the proceedings were concluded)

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**CERTIFICATE OF REPORTER**

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C. 09-5630 WHA, Petra Martinez v. America's Wholesale Lender, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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/s/ Lydia Zinn, CSR 9223, RPR

Thursday, March 4, 2010